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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS RODRIGUEZ et al., Defendants and Appellants.	F034219 (Super. Ct. No. 41420) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Howard R. Broadman, Judge.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Juan Carlos Rodriguez.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant Alberto Uribe Ruelas.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Stephen G. Herndon, Shirley A. Nelson and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

The Tulare County District Attorney filed an information charging appellants Juan Carlos Rodriguez and Alberto Uribe Ruelas with one count (count 1) of forcible rape in

concert (Pen. Code,[1] § 264.1), one count (count 2) of kidnapping to commit rape (§ 209, subd. (b)(1)), and three counts (counts 3, 4, and 5) of assault with a semiautomatic firearm (§ 245, subd. (b)).

Within the scope of the one strike law, count 1 included two 25-to-life allegations—movement of the victim by appellants substantially increased the risk of harm (§ 667.61, subds. (a), (d)(2)) and appellants kidnapped the victim and personally used a firearm (§ 667.61, subds. (a), (e)(1), (e)(4))—and two 15-to-life allegations—appellants kidnapped the victim (§ 667.61, subds. (b), (e)(1)) and personally used a firearm (§ 667.61, subds. (b), (e)(4)). Apart from the one strike law, count 1 included two allegations of personal use of a firearm (§§ 12022.3, subd. (a), 12022.53, subd. (b)) and one allegation of arming with a firearm (§ 12022.3, subd. (b)). Count 2 included two allegations of personal use of a firearm. (§§ 12022.5, subd. (a), 12022.53, subd. (b).[2])

Appellants pled not guilty and denied the allegations. The trial court ordered separate trials. On the second day of trial by jury, Rodriguez withdrew his plea and, with no plea bargain and no indicated sentence, pled guilty as charged. Two days later, Ruelas, who had not yet gone to trial, withdrew his plea and, with no plea bargain but with an indicated sentence of 25 years to life, pled no contest as charged.

The trial court sentenced Rodriguez to an aggregate term of 43 years to life: six years (middle term) on count 4, two years (one-third middle term) consecutively on count 5, 10 years consecutively for personal use of a firearm (§ 12022.53, subd. (b)), 25 years to life consecutively on count 1, and concurrently to life with possibility of parole on count 2.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Count 2 of the information characterized the section 12022.5, subdivision (a) allegation of personal use of a firearm as "within the meaning of Penal Code section 667.61(b)." Although the one strike law does not apply to kidnapping to commit rape (§§ 209, subd. (b), 667.61, subd. (c)), that reference was apparently just an inadvertence, as neither the information summary nor the reporter's transcript of sentencing nor the minute order of sentencing nor the abstract of judgment suggests any involvement of the one strike law in the count 2 sentence.

The trial court stayed execution of sentence on count 3 and on the other allegations. (§ 654.) The trial court imposed two restitution fines of $20,000 each, one pursuant to section 1202.4, the other pursuant to section 1202.45, and awarded 380 days of actual custody credit and 65 days of section 2933.1 conduct credit for a total of 445 days of presentence custody credit. Rodriguez filed a timely notice of appeal.

The trial court sentenced Ruelas to a term of 25 years to life on count 1 and stayed execution of sentence on all other counts and on all allegations. (§ 654.) The trial court imposed two restitution fines of $10,000 each, one pursuant to section 1202.4, the other pursuant to section 1202.45, and awarded 328 days of actual custody credit and 48 days of section 2933.1 conduct credit for a total of 376 days of presentence custody credit. Ruelas filed a timely notice of appeal.

Shortly after Ruelas filed a *Wende*[3] brief in this court, respondent filed a motion to dismiss his appeal, arguing that his notice of appeal fails to comply with rule 31(d) of California Rules of Court[4] and that he waived his right of appeal. Ruelas filed a response, arguing that his notice of appeal "liberally construed" satisfies rule 31(d) and that his attorney's waiver of his right of appeal was invalid without a personal waiver by him. (Rule 31(d).)

We will deny respondent's motion to dismiss Ruelas's appeal and, with some modifications, we will affirm the judgments as to each appellant.

FACTS

In the early morning of August 1, 1998, three women inside a parked car were about to go to work in the fields.[5] From a car that stopped beside theirs, Rodriguez stepped out and cocked a gun that he pointed at the women. He opened the door of their car, put the gun

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[3] *People v. Wende* (1979) 25 Cal.3d 436.

[4] Further references to rules are to the California Rules of Court.

[5] The facts are from the testimony of two of the three women, including the victim, at Rodriguez's trial just before he pled guilty. The trial court relied on those facts for purposes of plea and sentencing.

to the head of one of the women, and pulled her out by the arm. He threw her into the backseat of the other car and got in beside her. Ruelas drove away.

Rodriguez ordered the woman to take off her clothes. She refused. He put the gun to her head again. She took off her clothes. He raped her. Ruelas stopped the car and traded places with Rodriguez. Ruelas raped her while Rodriguez drove. The woman recognized both of her assailants as people she had seen before near her home.

DISCUSSION

RODRIGUEZ

(1) The Constitutionality Of The Sentence

No procedural principle is more familiar to the United States Supreme Court than that a defendant's failure to assert a federal constitutional right at trial can waive that right on appeal. (*United States v. Olano* (1993) 507 U.S. 725, 731; cf. *United States v. Young* (1985) 470 U.S. 1, 15-16.) A challenge to a sentence on the grounds of cruel and unusual punishment under the federal Constitution and cruel or unusual punishment under the state Constitution requires a trial court ruling on the specific facts of the case before a defendant has a right to appellate review. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; see also *People v. Davis* (1995) 10 Cal.4th 463, 507, fn. 8.)

As Rodriguez failed to raise a constitutional challenge to his sentence before the trial court, he has no right to raise that issue on appeal. Nonetheless, if only "to forestall a subsequent claim of ineffectiveness of counsel," we choose to address his claim on the merits. (*People v. Martin* (1995) 32 Cal.App.4th 656, 661, disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) In determining whether a particular punishment is constitutionally excessive, courts examine the nature of the offense and offender, the penalty the same jurisdiction imposes for other offenses, and the punishment other jurisdictions impose for the same offense. (*Solem v. Helm* (1983) 463 U.S. 277, 290-291, overruled on another ground in *Harmelin v. Michigan* (1991) 501 U.S.

957, 964-965; *In re Lynch* (1972) 8 Cal.3d 410, 425-427.) Rodriguez focuses his argument on the first two aspects of that analysis.

A punishment that involves "unnecessary and wanton infliction of pain" or is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment. (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" violates article I, section 17 of the California Constitution. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424, fn. omitted.)

Rodriguez argues his sentence of 43 years to life is "grossly disproportionate to the crime under the circumstances of [this] case" because the one strike law mandates a base term of 25 years to life regardless of his "age, social history, and lack of any significant criminal history." A sentence not otherwise constitutionally excessive does not become so simply because the statute authorizing that sentence mandates its imposition and precludes consideration of mitigating factors. (*Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 994-995; accord, *People v. Cooper* (1996) 43 Cal.App.4th 815, 823.)

A 39-year-old perpetrator who, like Rodriguez, suffered from alcoholism, had no felony priors, and inflicted no great bodily injury but who, unlike Rodriguez, chose to spare his victim the terror of seeing a weapon failed to persuade the judiciary his mandatory one strike law sentence of 25 years to life was constitutionally excessive. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 803-809.) That the perpetrator in that case was in his 30's and that Rodriguez was in his 20's is of no consequence. That Rodriguez terrorized his victim by cocking a semiautomatic firearm he put to her head, kidnapped her to rape her, substantially increased the risk of harm by moving her, and raped her in concert with another perpetrator shows his crimes were considerably more egregious than those in *Crooks*. In that light, we see no constitutional significance to the 18 additional years Rodriguez received over and above the mandatory one strike law sentence of 25 years to life both he and the perpetrator in *Crooks* received.

Rodriguez argues his crimes are "much less heinous" than first degree murder, for which the sentence is identical to the base term in the one strike law. (§§ 190, subd. (a), 667.61, subd. (a).) That the Legislature chooses to punish some crimes more harshly than first degree murder does not implicitly raise a constitutional question. (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1281.) The punishment for aggravated kidnapping, for example, which is life without possibility of parole even if the victim suffers bodily harm but does not die, has survived constitutional challenge. (§ 209, subd. (a); see, e.g., *People v. Castillo* (1991) 233 Cal.App.3d 36, 65-66; accord, *People v. Chacon* (1995) 37 Cal.App.4th 52, 64; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1237.) So have mandatory minimum life terms for offenses under the one strike law. (See, e.g., *People v. Alvarado* (2001) 87 Cal.App.4th 178, 199-201; *People v. Estrada*, *supra*, at pp. 1277-1282.)

The finality of murder makes that crime categorically different from any other, but the multiple traumas of a cocked semiautomatic firearm at one's head, a kidnapping, substantial movement during the kidnapping, and a rape in concert are indisputably grave. Rodriguez's conduct, not his sentence, shocks the conscience and offends fundamental notions of human dignity. We find his punishment neither cruel and unusual under the federal Constitution nor cruel or unusual under the state Constitution. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

(2) The Stay Of Execution Of Sentence

The probation report recommended, and the trial court imposed, a concurrent count 2 sentence of life with possibility of parole for kidnapping to commit rape. Rodriguez argues, and respondent concedes, section 654 compels a stay of execution of that sentence. We agree. Section 654 precludes punishing him both for forcible rape in concert and for kidnapping to commit rape. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1205-1217; 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 149, pp. 213-214.)

(3) The Section 1202.4 Restitution Fine

Respondent argues, and by filing no appellant's reply brief Rodriguez tacitly concedes, modification of the judgment is necessary to strike one of his two $10,000 section 1202.4 restitution fines. We agree. Section 1202.4 states in relevant part: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) The maximum restitution fine in a criminal prosecution is $10,000 regardless of the number of victims or counts. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.)

(4) The Section 1202.45 Restitution Fine

Respondent argues, and by filing no appellant's reply brief Rodriguez tacitly concedes, modification of the judgment is necessary to decrease to $10,000 his section 1202.45 restitution fine. We agree. Section 1202.45 states: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked." (See *People v. Smith* (2001) 24 Cal.4th 849, 851.) Since his section 1202.4 restitution fine is $10,000, his additional section 1202.45 restitution fine is necessarily $10,000.

(5) The Presentence Custody Credit

Respondent argues, and by filing no appellant's reply brief Rodriguez tacitly concedes, modification of the judgment is necessary to decrease his award of presentence custody credit. The trial court, which awarded him 380 days of actual custody credit and 65 days of section 2933.1 conduct credit for a total of 445 days of presentence custody credit, erred in calculating both the number of days of actual custody credit and the number of days of section 2933.1 credit.

Rodriguez served 381 actual days in custody from his arrest on August 1, 1998, to his sentencing on August 16, 1999. Since rape in concert is a section 667.5 felony, section 2933.1 limits his conduct credit to 15 percent of his actual custody credit. (§§ 667.5, subd. (c)(18), 2933.1, subd. (a).) The correct calculation of his presentence custody credit is 381 days of actual custody and 57 days of section 2933.1 conduct credit for a total of 438 days. (*People v. Duran* (1998) 67 Cal.App.4th 267, 269-270.) The trial court's incorrect computation yielded a sentence without authority of law subject to correction by the trial court or the appellate court. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

RUELAS

(1) Compliance With Rule 31(d)

To appeal a judgment after a no contest plea, section 1237.5 imposes two requirements—a statement from the defendant "showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" and a certificate of probable cause from the trial court—but the record here pincludes neither of those documents. The sole exception to those section 1237.5 requirements arises from the second paragraph of rule 31(d):

> "If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search and seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds."

As no adjudication of a section 1538.5 motion is in the record, only grounds "occurring after entry of the plea which do not challenge its validity" could possibly grant Ruelas a right of appeal. (Rule 31(d).) His handwritten in pro. per. notice of appeal includes the reference "California Rules of Court 31 [*sic*]" and articulates an appeal from "a sentenced emposed [*sic*] on Aug. 16, 1999" but does not expressly recite as the basis of

his appeal grounds "occurring after entry of the plea which do not challenge its validity." (Cf. rule 31(d).)

In *People v. Lloyd* (1998) 17 Cal.4th 658, the Supreme Court analyzed a similar handwritten in pro. per. notice of appeal that had a reference to "Rule 31(d)" and a statement of appeal from the "sentence" but no statement of grounds "occurring after entry of the plea which do not challenge its validity" as the basis of the appeal. (*Id.* at pp. 664-665.) Noting rule 31(b) requires that the notice of appeal "shall be liberally construed in favor of its sufficiency" and finding no requirement in rule 31(d) that the notice of appeal make "the requisite statement of basis expressly rather than impliedly," the Supreme Court found the notice of appeal adequate. (*People v. Lloyd*, *supra*, at p. 665.) As in the case at bar, the appeal in *Lloyd*, which did not challenge the plea, arose out of a no contest plea with no plea bargain. (*Ibid.*)

Although the Attorney General conceded the adequacy of the notice of appeal in *Lloyd*, the Supreme Court's holding rested only in part on that concession and rested in part on an independent analysis of rule 31(d). (*People v. Lloyd*, *supra*, 17 Cal.4th at pp. 664-665.) The Attorney General challenges the adequacy of the notice of appeal in the case at bar, but we cannot rely on the sole case on which the motion to dismiss relies for that challenge, as the issuing court granted a rehearing and ultimately issued an opinion not for publication. (See rules 976, 977.)

As Ruelas sought no certificate of probable cause and makes no attempt to show "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," his notice of appeal is not subject to the rule requiring strict adherence to the requirements of rule 31(d), which applies only to the *first* paragraph of that rule. (Cf. *People v. Mendez* (1999) 19 Cal.4th 1084, 1097.) By seeking to appeal within the scope of the *second* paragraph of rule 31(d), Ruelas puts his case not only within the scope of the rule requiring liberal construction of a notice of appeal (rule 31(b)), but also within the scope of our authority to relieve a party from failure to comply with the rules of court (rule 45(e)).

Appellate courts sometimes grant leave to file an amended notice of appeal, even after a case is fully briefed, to cure noncompliance with rule 31(d). (See, e.g., *People v. Phillips* (1994) 25 Cal.App.4th 62, 67, fn. 3; *People v. Peel* (1993) 17 Cal.App.4th 594, 596, fn. 2.) In the interest of judicial efficiency and in reliance on *Lloyd*, we find Ruelas's notice of appeal "liberally construed" satisfies rule 31(d). (Rules 31(b), 45(e); *People v. Lloyd*, *supra*, 17 Cal.4th at pp. 661, 665.)

(2) Waiver Of Right Of Appeal

The record shows a waiver by Ruelas's counsel, but no personal waiver by Ruelas, of his right of appeal. In the motion to dismiss, respondent argues: "Ruelas cites no authority for his implicit proposition that counsel is without authority to waive a purely statutory right, particularly in the presence of the defendant and without objection by the defendant." In his response, Ruelas notes respondent cites no authority for the "conclusory position" that no personal waiver of the right of appeal is necessary. Assuming without deciding that absence of a personal waiver of Ruelas's right of appeal invalidates his attorney's waiver of that right, we turn to his *Wende* brief.

(3) *Wende* Brief

Ruelas's appointed counsel filed an opening brief that summarizes the facts, cites the record, raises no issues, and asks for an independent review of the record. (*People v. Wende*, *supra*, 25 Cal.3d 436.) By letter of June 6, 2000, the clerk of the court invited Ruelas to submit any other brief he might wish to present and to write a letter stating any grounds of appeal he might wish the court to consider. He has not done so.

We note two sentencing considerations. First, the probation officer's report correctly recommended, and the trial court correctly imposed, a section 654 stay of execution of Ruelas's count 2 sentence for kidnapping to commit rape. Section 654 precludes punishing him both for forcible rape in concert and for kidnapping to commit rape. (See *People v. Latimer*, *supra*, 5 Cal.4th at pp. 1205-1217; 3 Witkin & Epstein, Cal. Criminal Law, *supra*, § 149, pp. 213-214.) The minute order of sentencing states, "CT. 2—Life with possibility of parole, special allegations stayed. Purs. to PC 654," an

ambiguous entry that fails to elucidate whether the stay applies only to the special allegations or to the life sentence as well. The abstract of judgment, which shows a concurrent indeterminate sentence on count 2 with no section 654 stay, is simply wrong.

Second, the trial court, which awarded Ruelas 328 days of actual custody credit and 48 days of section 2933.1 conduct credit for a total of 376 days of presentence custody credit, erred in calculating both the number of days of actual custody credit and the number of days of section 2933.1 credit. He served 380 actual days in custody from his arrest on August 2, 1998, to his sentencing on August 16, 1999. Since rape in concert is a section 667.5 felony, section 2933.1 limits his conduct credit to 15 percent of his actual custody credit. (§§ 667.5, subd. (c)(18), 2933.1, subd. (a).) The correct calculation of his presentence custody credit is 380 days of actual custody and 57 days of section 2933.1 conduct credit for a total of 437 days. (*People v. Duran*, *supra*, 67 Cal.App.4th at pp. 269-270.) The trial court's incorrect computation yielded a sentence without authority of law subject to correction by the trial court or the appellate court. (*People v. Guillen*, *supra*, 25 Cal.App.4th at p. 764.)

Our independent review of the record discloses no other reasonably arguable appellate issues. "[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

As to Juan Carlos Rodriguez, the sentence on count 2 is ordered stayed pursuant to section 654. We remand the matter to the trial court with directions to modify the abstract of judgment accordingly. We further direct the trial court to strike one of the two $10,000 section 1202.4 restitution fines, to decrease from $20,000 to $10,000 the section 1202.45 restitution fine, to correct the award of presentence custody credit from 445 days (380

days of actual custody credit and 65 days of § 2933.1 conduct credit) to 438 days (381 days of actual custody and 57 days of § 2933.1 conduct credit), and to forward a certified copy of the amended abstract to the Department of Corrections. As so modified, the judgment is affirmed.

As to Alberto Uribe Ruelas, we deny respondent's motion to dismiss the appeal. The sentence on count 2 is ordered stayed pursuant to section 654. We remand the matter to the trial court with directions to modify the abstract of judgment accordingly. We further direct the trial court to correct the award of presentence custody credit from 376 days (328 days of actual custody credit and 48 days of § 2933.1 conduct credit) to 437 days (380 days of actual custody and 57 days of § 2933.1 conduct credit), and to forward a certified copy of the amended abstract to the Department of Corrections. As so modified, the judgment is affirmed.

_____
Wieland, J.*

WE CONCUR:

_____
Ardaiz, P.J.

_____
Levy, J.

*Judge of the Madera Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.